

D.P.U. 89-DS-116

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by New England Excavating Inc.

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APPEARANCE:     Joseph Pittorino, President  
                       New England Excavating, Inc.  
                       19 Bulette Road  
                       Acton, Massachusetts 01720  
                             PRO SE  
                             Respondent

## I. INTRODUCTION

On October 18, 1989, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to New England Excavating ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on August 21, 1989 on Upton Street, Grafton, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground pipe operated by Commonwealth Gas Company ("Commonwealth Gas" or "Company").

On October 31, 1989, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent asserted that the damaged gas line on Upton Street had been improperly marked and buried. In a letter dated July 30, 1990, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that the Respondent had failed to take adequate precautions because it had not provided evidence that Company facilities were not marked or improperly buried.

On August 9, 1990, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07 (3). After due notice, an adjudicatory hearing was held on August 6, 1991 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Mario Reid, Compliance Officer with the Division, represented the Division. Paul Pouliot, superintendent of technical services for Commonwealth Gas, testified for the Division. Joseph Pittorino, President of New England Excavating, testified for the Respondent.

## II. SUMMARY OF FACTS

### A. The Division's Position

At the hearing, Mr. Reid introduced an underground damage report from Commonwealth Gas (Exh. D-1). In the report, Commonwealth Gas alleged that the Respondent failed to use reasonable precautions to prevent damage to the pipes. (id.).

Mr. Pouliot stated that the Company had marked the area in question on June 6, 1989 (id. at 11-12). Mr. Pouliot also stated that a second Company marking of the area occurred on July 28, 1989, in response to Dig-Safe request #89302445 (Tr. at 12; Exh. D-2). Mr. Pouliot further stated that on August 21, 1989 on Upton Street in Grafton, the Respondent damaged a Company service line ("service") at a depth of approximately three feet (id. at 12-13, 25; Exh. D-1). He testified that in 1991, a Company valve in close proximity to the service was measured at a depth of 30 inches, and reasoned that the service was at the same depth (Tr. at 16-17, 25). He also testified that the Company was responsible for burying its lines at a minimum depth of 24 inches (id. at 17). Mr. Pouliot stated that the Company replaced approximately eleven feet of the service as a result of the damage caused by the Respondent (id. at 14; Exh. D-8). He further testified that the cost of material used to replace a damaged line was minimal, and that installing a longer piece of line than was actually damaged was normal [procedure] (Tr. at 29).

Mr. Pouliot contended that the excavation was not performed with caution and that the service could not have been located at a depth of less than 24 inches (Tr. 16-17; Exh. D-1). Mr. Pouliot also testified that he had no knowledge of a boulder in the trench (Tr. at 30-31). He

further testified that the machine used by the Respondent was a large enough to break the service easily (Tr. 17-18). Mr. Pouliot asserted that the Respondent was aware of the location of the service, and should have used extra precautions while using a large machine to excavate a small service (id. at 18, 30).

Mr. Pouliot testified that the Company had no indication that the service was not marked with a marking tape, and that installing a marking tape twelve inches above the service in the ground was standard Company practice in 1978, when the service was installed (id. at 19, 26-28, 38-39). He also stated that it would be "very hard" for the Company to locate any service without a tracer wire (id. at 38). Mr. Reid alleged that the Respondent should have attempted to locate the marking tape by hand-digging before using heavy machinery (id. at 36).

#### B. The Respondent's Position

Mr. Pittorino testified that the Respondent was aware of the location of the service in question<sup>1</sup> when it damaged the service in question (id. at 22, 26, 33-34). Mr. Pittorino also testified that the Respondent was in the process of removing the top layer of a mixture of asphalt and macadam when it encountered the damaged service (id. at 27, 40). He asserted that the damage could have been caused by a tooth of the excavating machine, or a rock, which might have penetrated the service as the asphalt was being excavated (id. at 40).

Mr. Pittorino testified that the total length of the project was 5,000 feet, and that the Respondent had encountered no problems with any of the [other] underground gas facilities (id.

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<sup>1</sup> The Dig-Safe Law provides for lateral designating markings only and does not give depth indications.

at 32-33). Mr. Pittorino maintained that the Company's services were consistently buried at a minimum depth of 18 inches on the excavation site, with the exception of the damaged service which he stated was buried at a maximum depth of 14 inches (id. at 27, 41). He stated that the Respondent normally excavated to a depth of one foot by machine before it began to hand-dig (id. at 27). He stated that asphalt cannot be excavated by hand (id.). Mr. Pittorino contended that the Respondent had taken reasonable precautions by using a machine to remove only the top eight to ten inches of cover (id. at 34).

Mr. Pittorino testified that underground gas facilities are usually marked with tracer wire or marking tape above them at a depth between ten and 18 inches, and that neither were present above the service in question (id. at 34).<sup>2</sup> He asserted that if the Respondent had encountered either tracer wire or marking tape in the first eight to ten inches of excavation, it would have stopped excavation with the large machine (id.).

Mr. Pittorino further stated that a large boulder had existed directly below the service, and that the Respondent had removed it after the service was damaged (id.). Mr. Pittorino alleged that the Company had installed its service line over the boulder, at a shallow depth, instead of removing the boulder and installing it at the proper depth (id. at 27-28). He also alleged that the Company had installed approximately eleven feet of line to replace a significantly smaller amount of damaged line because it had to lower the entire service line to a proper depth (id. at 27). Finally, he maintained that if the service had been located at the proper depth, the damage would

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<sup>2</sup> Mr. Pouliot testified that standard Company practice would have placed a warning tape at a depth of twelve inches below the finished grade (Tr. at 28).

not have occurred (id. at 28).

Mr. Pittorino alleged that a lack of reasonable precaution has not been shown to exist in the instant case because: (1) there is a lack of supporting physical evidence; (2) the pictures presented by the Division are over a year old; and (3) the Division presented no impartial witnesses (id. at 30).<sup>3</sup>

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co. v. Boston Gas Company, D.P.U. 88-DS-45 (1990); Northern Foundations, Inc. v. Berkshire Gas

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<sup>3</sup> Mr. Pittorino contended that a clerk from the Town of Grafton was on site for the entire excavation and could have been an unbiased witness (Tr. at 31, 41-42). The Hearing Officer made a bench request for an informational statement from the Clerk, which Mr. Pittorino agreed to provide (id. at 43). Mr. Pittorino did not respond to this bench request.

Company, D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992). In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. Id. at 5-6.

#### IV. ANALYSIS AND FINDINGS

The issue to be decided in this case is whether the excavator failed to exercise reasonable precautions to avoid damage to underground facilities.

The Respondent asserted that the Company installed the service at a shallow depth. The Department has consistently found that a variation in depth does not relieve an excavator from the duty to use reasonable precautions. See Fed. Corp., supra; Amorello v. Commonwealth Gas Company, D.P.U. 89-DS-61 (1990). However, the depth of an underground utility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities.

The Respondent testified that the service was located in the top 14 inches of the excavation, directly below a fused mixture of asphalt and macadam. The Respondent contended that because the mixture could not be excavated by hand, when the Respondent removed the top layer of asphalt and macadam by machine, the service was damaged. Mr Pittorino stated that he was on the site consistently throughout the project, and had visited the location of the damaged service directly before and after the damaged occurred.

In contrast to the Respondent's allegations of improper depth, the Division presented an underground damage report which claimed that the service was located at a depth of three feet. However, the Division failed to present the author of that report, or any witnesses who were present on the site during the Respondent's excavation to corroborate those findings. In fact, Mr. Pouliot testified that he educated himself on the instant case by interviewing employees who had visited the excavation site, and by reading documents written by those employees. He never stated that he had visited the site at the time of the incident.

In addition, although Mr. Pouliot testified that the service was located at a depth of 30 inches, he admitted that the measurement was not taken on the service, but was actually taken for a valve in close proximity to the service. Further, this measurement was taken in 1991, close to two years after the damaged had occurred and after the damaged pipe was repaired.<sup>4</sup>

The Division alleged that the Respondent failed to use reasonable precautions by not hand-digging prior to using large machinery to excavate, and that this action caused damage to an underground facility. However, the Respondent stated that hand-digging was impossible for excavating the asphalt portion of the excavation. This statement was not controverted by the Division. In the past, when hand-digging is impossible, the Department has found that an excavator who has damaged an underground facility with a large machine may not have violated the Dig-Safe Law. See Fed. Corp., supra. Although the Division alleged that additional

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<sup>4</sup> Based on the record, it appears that the service may have been located at a shallow depth due to the presence of a boulder. It is the obligation of all companies to install all gas pipes in a manner that is consistent with applicable standards and practices.

precautions should have been taken, the Division did not provide evidence on what reasonable precautions, other than hand-digging, the Respondent could have taken to prevent damage. Id.

In specific instances where there has been an allegation without demonstrating any precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra.<sup>5</sup> The Division did not adequately demonstrate that the Respondent failed to exercise reasonable precautions when excavating at the locus. Accordingly, the Department finds that the Respondent used reasonable precautions when excavating on Upton Street in Grafton, Massachusetts, on August 21, 1989, in conformance with the requirements of the Dig-Safe Law.<sup>6</sup>

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<sup>5</sup> The Supreme Judicial Court may set aside a decision as prejudiced for further action when that decision is "(e) Unsupported by substantial evidence." G.L. c. 30A, §§ 14(7). Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, §§ 1(6).

<sup>6</sup> We caution that this finding should not be construed as approval of the Respondent's excavating methods nor as a pronouncement of a new standard for excavators to follow. Common sense would tell us that use of a track machine as the tool of choice for an initial excavation in an area where underground facilities are known to exist may not be appropriate. Where there is material evidence to support an inference of a lack of reasonable care, failure on the part of the excavator to provide evidence to negate the allegation will lead to a finding that the excavator has violated the Dig-Safe Law. Northern Foundations, Inc. v. Berkshire Gas Company, D.P.U. 87-DS-54 (1990). Therefore, we will continue to evaluate whether the precautions taken by excavators digging near marked utilities were reasonable given the facts of each case.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That New England Excavating Inc. used reasonable precautions when excavating on Upton Street in Grafton, Massachusetts, on August 21, 1989, and thus was in conformance with the requirements of the Dig-Safe Law. Therefore, it is

ORDERED: That the NOPV issued against the Respondent is hereby Dismissed.

By Order of the Department,